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No. 83-874

In the Supreme Court of the United States

OCTOBER TERM, 1983

TRACY COY POE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioner's retrial following the granting of a defense mistrial motion and the reversal of the district court's granting of petitioner's motion to dismiss the indictment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A10-A18) is reported at 713 F.2d 579. The opinions of the district court (Pet. App. A1-A6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1983 and rehearing was denied on September 28, 1983 (Pet. App. A7-A9). The petition for a writ of certiorari was filed on November 28, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and several co-defendants were indicted by a grand jury in the Western District of Oklahoma. Petitioner was charged with one count of operating an illegal gambling business, in violation of 18 U.S.C. 1955; one

count of traveling in interstate commerce and using interstate facilities with intent to promote, manage, and facilitate an unlawful activity, in violation of 18 U.S.C. 1952; and one count of transmission in interstate commerce of wagering information, in violation of 18 U.S.C. 1084.[1] After the fifth day of a jury trial and before the government had completed presentation of its case, the district court granted a defense mistrial motion based upon "repeated violations" by government witnesses of the court's sequestration order, entered pursuant to Fed. R. Evid. 615 (Pet. App. A1-A2). The defendants then moved to dismiss the indictment on the ground that retrial would violate the Double Jeopardy Clause of the Fifth Amendment.[2] The district court granted these motions and dismissed the indictment (Pet. App. A3-A6). The government appealed, pursuant to 18 U.S.C. 3731, and the court of appeals reversed (Pet. App. A10-A18).

The mistrial was based on two alleged violations of the sequestration order by FBI agents. The facts surrounding these incidents are recounted in detail in the court of appeals' opinion (Pet. App. A12-A14). Briefly, the first incident concerned Agent James Hawkins, who testified about a search of petitioner's residence that had been carried out more than three years earlier. Hawkins was asked

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[1]Petitioner and co-defendant William Gibbs were named in all three counts. Co-defendants Leroy Hines, Carla Hines, Anna Mae Hines, Paul Neal, Edward Harma, Donna Fogerty, and Mark Baron were charged with operating an illegal gambling business. Fogerty and Baron pleaded guilty, after the second day of trial, to a charge of transmitting wagering information, in violation of 18 U.S.C. 1084.

[2]Co-defendant Anna Mae Hines also moved to dismiss on the grounds that her Sixth Amendment rights to a speedy and public trial by an impartial jury and to confrontation and cross-examination of witnesses had been violated (Pet. App. A11). The district court granted that motion (*id.* at A6), but the court of appeals reversed (*id.* at A17).

on cross-examination if he had participated in a strip search at the residence, and Hawkins replied that he did not recall any strip search. Confronted with an FBI report indicating that such strip searches had taken place, Hawkins said that such searches might have occurred but that he did not participate in them and had no first-hand knowledge of them (Pet. App. A12-A13).

At a recess following the conclusion of his testimony Hawkins was asked by other FBI agents waiting to be called as witnesses why he had been so long on the witness stand. He then explained that there had been some question about the occurrence of strip searches at the Poe residence and his participation in them (Pet. App. A13).[3] Defense counsel overheard this conversation and promptly reported it to the district court, which conducted a hearing into the incident out of the presence of the jury. At the conclusion of the hearing, the defendants made a variety of motions. Petitioner moved for dismissal of the indictment (Tr. 806-808), and his co-defendants subsequently moved in the alternative to exclude the testimony of the affected witnesses or for a mistrial (Tr. 808-809).[4] After taking the matter under advisement, the court decided not to terminate the trial and instead instructed the jury that the violation of the sequestration order could be considered in assessing the credibility of Hawkins and those with whom he had conversed (Pet. App. A13-A14).

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[3]Other government witnesses later testified that two strip searches were in fact conducted at petitioner's residence and that nothing incriminating was discovered in either search. Neither of the persons searched was named as a defendant in this case (Pet. App. A13).

[4]The district court erroneously believed that granting the mistrial motion would bar retrial. Tr. 813-814. Thus, the court perceived no practical difference between that motion and petitioner's motion to dismiss. Tr. 813-814. It was apparently for this reason that the court never asked petitioner's counsel whether he joined the mistrial motion.

The next incident involved former agent Nanette Hittmeirer, who had participated in searches of the residences of co-defendants Carla Hines and Anna Mae Hines. A preceding witness had been asked on cross-examination whether any strip searches had been conducted at either of the Hines residences, and Hittmeirer testified that there was no strip search at either residence (Pet. App. A14).

On cross-examination, Hittmeirer was asked if she had discussed her testimony with anyone beforehand, and she answered that she had spoken very briefly with a supervisory FBI agent about possible areas of cross-examination. The supervisory agent had testified earlier in the case, but his conversation with Hittmeirer did not pertain in any way to his previous testimony, which concerned an entirely different aspect of the case (*ibid.*).

At this point, counsel for one of petitioner's co-defendants stated in the presence of all counsel: "I would renew our motion to dismiss or alternative motion for mistrial" (Tr. 1155). Counsel for one other co-defendant expressly joined the mistrial motion (Tr. 1158). The government argued that Hittmeirer had not violated the exclusion order.[5] The district court declined to order a mistrial, and Hittmeirer's testimony continued to its conclusion. After a weekend recess, however, the district judge declared a mistrial without hearing further argument. Later the defendants filed motions to dismiss, which the district court granted (Pet. App. A15).

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[5]The court of appeals noted that it is in fact unclear from the district court's order whether a witness was permitted to discuss with another, in advance of his testimony, the possible areas about which he or she might be questioned when called as a witness (Pet. App. A15).

2. The court of appeals reversed, finding that, whatever the merits of the district court's decision to grant a mistrial, it was error to have dismissed the indictment, because retrial would not be barred by the Double Jeopardy Clause. The court of appeals found applicable the general rule that where a defendant requests a mistrial, there is no bar to retrial. *United States* v. *Dinitz*, 424 U.S. 600, 607 (1976); *United States* v. *Tateo*, 377 U.S. 463, 467 (1964). The facts of this case, the court of appeals held, did not bring it within the exception to that rule, enunciated in *Oregon* v. *Kennedy*, 456 U.S. 667 (1982), for prosecutorial misconduct calculated to goad a defendant into requesting a mistrial. While there may have been careless behavior on the part of the government witnesses, the court of appeals held, it did not amount to intentional prosecutorial misconduct designed to provoke a defense request for a mistrial (Pet. App. A15-A17).

ARGUMENT

1. The court of appeals' decision is plainly correct, and petitioner's claims of error are all insubstantial. Citing *United States* v. *Jenkins*, 420 U.S. 358 (1975), petitioner argues (Pet. 8) that the court of appeals lacked jurisdiction to entertain the government's appeal because 18 U.S.C. 3731 does not authorize an appeal from a dismissal where, as here, a retrial would be required. Recognizing that *Jenkins* was overruled in *United States* v. *Scott*, 437 U.S. 82 (1978), which held that the government may appeal from a midtrial dismissal when it is procured by the defendant and does not constitute an acquittal, petitioner attempts to escape the application of *Scott* by pointing out that he did not request a mistrial. Petitioner admits, however, that he sought outright dismissal instead of a mistrial (Pet. 9), and it is clear that the declaration of a mistrial and dismissal were in no way based on a finding that the government had failed to establish its case. Thus, the situation here is precisely the same in all material respects as that in *Scott*.

2. Petitioner further argues (Pet. 6-8) that the government is barred from retrying him because the prosecutor erroneously answered in the affirmative when the district court asked whether he agreed with the court's view that declaring a mistrial would have the same effect for double jeopardy purposes as a dismissal (Tr. 813-814). Petitioner claims that he relied on the prosecutor's erroneous opinion and that the government's subsequent attempt to retry him violated due process. He contends that if the government had not conceded the double jeopardy issue, he would have actively opposed the mistrial ruling. Petitioner, however, overlooks the fact that he had already moved for dismissal before the prosecutor's statement was made (see Tr. 807-814). As a result, he can hardly claim now that he was depending on the prosecution's viewpoint in deciding whether to seek termination of the trial. In addition, since under *Scott* appeal and retrial would have been permissible had the court granted a dismissal, it does not appear that petitioner could have relied on the prosecutor's "concession" as an agreement that double jeopardy would bar further prosecution in either event, when the law was that it would be barred in neither, and the prosecutor's statement was fully consistent with that result.

In any event, unlike cases in which the government enters into a plea agreement or other contractual promise on which a defendant has a right to rely (see *Santobello* v. *New York*, 404 U.S. 257 (1971)), here the government did not enter into any stipulation or promise of any kind embodying the prosecutor's mistaken impression of law. The prosecutor merely gave his opinion about the legal consequences of the action the defense had sought. The defendant had his own attorney on whom he could call for legal advice. It is not customary for defendants to accept unquestioningly the prosecution's interpretation of the applicable law, and if they do so it must surely be at their own risk. As the court of

appeals stated in response to petitioner's argument, neither the courts nor the government is "bound by any such misconception of the law" (Pet. App. A18). See *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957).

3. Finally, petitioner maintains (Pet. 9-10) that the court of appeals erred in considering this a case where the mistrial was sought by the defense, because he himself did not move for a mistrial. He did, however, argue for dismissal, and he did so for the same reason that his co-defendants urged a mistrial. And as the court of appeals noted (Pet. App. A16 n.* (emphasis in original)), "when the district court declared a mistrial, there was *no* objection from *any* defendant. Under the circumstances, we deem Poe's absence of any objection to be at least tacit, if not outright, approval." Moreover, by initially moving for dismissal of the indictment, rather than first seeking a mistrial, petitioner merely sought in one step what his co-defendants sought in two. That petitioner chose this short cut surely makes no difference for double jeopardy purposes. Petitioner clearly relinquished his right to have the first trial concluded, and therefore the court of appeals was correct in applying the rule that where the defendant himself requests termination of the proceedings against him, the Double Jeopardy Clause is no bar to retrial unless judicial or prosecutorial misconduct had occurred that was intended to provoke the defense request. *Oregon* v. *Kennedy*, 456 U.S. at 672-673, 676. The court of appeals was likewise correct in concluding that there was absolutely nothing in the record to indicate an intent on the part of the government to provoke a mistrial request (Pet. App. A16). See *United States* v. *Wodtke*, 711 F.2d 86, 87-88 (8th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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